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The Freedom of Information Act and Trade Secrets

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by Roger V. Skalbeck

Recently the Air Force appealed a federal district court case involving disclosure of information under the Freedom of Information Act, but lost. It might surprise you to know that the agency was arguing to have the information revealed, not concealed. At the heart of the case is a question of how corporate trade secret protection is treated under federal law. Specifically, the case involves questions about the type of information that can be withheld under a Freedom of Information Act (FOIA) request by a third party. This case provides a good illustration of one area where federal law intersects with trade secret questions, a subject area normally governed by state laws.

Patent and copyright protection is exclusively governed by federal law, and almost every trademark issue is as well. However, laws about trade secrets are most commonly governed by state law. State protection of trade secrets arises in two forms: by statute or by common law (i.e., court cases). Approximately 45 states and the District of Columbia have adopted a version of the Uniform Trade Secrets Act. Statutes that enact a version of this uniform law typically define aspects of trade secrets, followed by information on damages and relief available under the statute. In other states, including New York and Texas, common law governs trade secret protection.

There are federal criminal statutes that deal with trade secrets, but none of these give a company a private right of action to seek that potential trade secrets remain secret. Therefore a company traditionally turns to state law when seeking to prevent disclosure of information considered a trade secret. In matters involving information provided to government agencies, state laws provide little direct protection to prevent disclosure. In these circumstances, FOIA provides certain protections, as illustrated in the Air Force case.

In 2002, the Air Force awarded a multi-year contract to two companies for repair and maintenance of airplane engines. The following year, an unsuccessful contract bidder filed a FOIA request, seeking a copy of the contract. The companies who won the contract fought against having to disclose the information through a reverse-FOIA action. This type of action is typically used to enjoin the federal government from disclosing information.

In assessing whether to reveal the information, the Air Force issued a Decision Letter seeking to compel disclosure of all contract details. The contracting companies appealed and won a summary judgment in a federal district court. That court held that line item prices listed in the contract were trade secrets, preventing their disclosure. However, hourly rates charged under the contract could be disclosed.

The Air Force was the only party to appeal, seeking to allow disclosure of the line item prices under the contract. The Court of Appeals for the District of Columbia affirmed the district court's decision, holding that the Air Force had acted arbitrarily and capriciously with their actions. Therefore line-item pricing information can enjoy trade secret protection through a specific FOIA exemption to prevent its disclosure.

State law provides the only private right of action . . . to prevent disclosure . . . if another company or individual . . . attempts to disclose a trade secret.

When someone requests information through FOIA, there are exemptions in the statute where FOIA requirements don't apply. When something is subject to one of the exceptions, the information cannot be disclosed. The fourth exemption in the statute covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4). As courts have interpreted this, trade secrets can be considered separately from privileged or confidential commercial or financial information.

The D.C. Circuit judges did not directly analyze the trade secret status of line item prices in this case. Instead, they relied on earlier cases that established that line item prices come within Exemption 4 of the relevant FOIA statute. The two questions the court considered in this case were: 1) whether disclosure would impair the government's ability to obtain necessary information in the future, or 2) whether disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained.

In the area of government contracts with an open bidding process, the government may have an interest in disclosing as many of the contract details as

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possible. If companies bidding on a contract know what all the prices and terms their competitors have used in the past, this would tend to drive down prices. Lower contract bids would then save government agencies money.

On the other hand, companies bidding on government contracts have a strong financial interest in keeping confidential as many contract details as possible. If bidders have no idea what their competitors charge for labor, parts, or other contract elements, there is far less need for lower bids.

As shown in this Air Force contracting case, information involving line-item pricing can constitute a trade secret, and it should not be disclosed under these circumstances. However, hourly labor rates could be disclosed, making them neither trade secrets nor confidential financial information for the company that won this specific contract.

For questions of company information sought to be protected, state trade law will still govern almost every aspect of trade secret protection. State law provides the only private right of action for a company to prevent disclosure or obtain any remedies if another company or individual misappropriates or attempts to disclose a trade secret. However, when certain information is provided to the federal government, courts can look to federal FOIA laws to see if and when disclosure of this information is required. Trade secrets are not exclusively a state law issue, but still mostly they are.

Case: Canadian Commercial Corp. v. U.S. Dept. of the Air Force, D.C. Cir., No. 06-5310, 1/29/2008.

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